

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTONIO PEARSON,	:
Plaintiff	:
v.	:Case No. 3:12-cv-110-KRG-KAP
BUREAU OF CORRECTIONS INDUSTRY,	:
<u>et al.</u> ,	:
Defendants	:

Order, Report and Recommendation

Order and Recommendation

Plaintiff's motion to stay, docket no. 22, is denied.
I recommend that defendants' motion to dismiss, docket no. 19, be granted.

Report

Plaintiff, serving a life sentence and currently incarcerated at S.C.I. Coal Township, filed a complaint alleging that defendants conspired to retaliate against him for exercising his First Amendment rights. The facts underlying this conclusory assertion appear to be that plaintiff bought a television from the moving defendants, subsequently alleged that it was defective, and sued some of the defendants in state court. Plaintiff attempts in the present federal suit to drag the vendor of the television and employees of the Pennsylvania Department of Corrections back into court on a theory that they acted improperly in opposing his state court lawsuit.

Plaintiff paid the filing fee, then sought to have the taxpayer pay the cost of serving his complaint on the twenty five or so named defendants by filing a motion to proceed *in forma*

pauperis. I recommended denial of plaintiff's motion to proceed *in forma pauperis*, and also issued a notice under Fed.R.Civ.P. 4(m). My Report and Recommendation came back stamped "refused by inmate"; at about the same time plaintiff filed a motion to extend time to serve defendants.

The Court, without adopting my Report and Recommendation, reviewed the matter de novo, denied the motion to proceed *in forma pauperis*, dismissed some defendants for lack of subject matter jurisdiction and failure to state a claim, denied the motion to extend time for service, and ordered the Clerk to dismiss the complaint without prejudice under Rule 4(m) as to any defendants for whom a return of service was not filed by October 31, 2012.

Shortly thereafter, moving defendants filed their motion to dismiss, docket no. 19. I ordered plaintiff to respond by November 7, 2012, which came and went without reply from plaintiff. Plaintiff filed the above mentioned motion to stay, representing that he had never refused my Report and Recommendation, and never received it. Plaintiff then also filed an interlocutory appeal from the Court's October 1, 2012 Order, apparently in the mistaken belief it was an order dismissing the action.

The motion to stay is unnecessary. The Court conducted a de novo review of the record and denied the plaintiff's motion. A copy of my earlier Report and Recommendation is enclosed with this one for plaintiff's records.

Plaintiff has not responded to the motion to dismiss at docket no. 19. The motion to dismiss should be granted. The motion tracks the reasoning in the Court's Order of October 1, 2012: there is no diversity jurisdiction because the amount in controversy could never reach \$75,000, and plaintiff's complaint fails to state a claim within the court's federal question jurisdiction because the claim of conspiracy is completely conclusory.

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have fourteen days to serve and file written objections to this Report and Recommendation.

DATE: November 9, 2012

KEITH A. PESTO
Keith A. Pesto,
United States Magistrate Judge

Notice to counsel of record by ECF and by U.S. Mail to:

Antonio Pearson BL-0521
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021